

FILED BY CLERK

JAN 22 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

DANIEL AARON LOPEZ,

Appellant.

2 CA-CR 2006-0036
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20051252 and CR-20052157 (Consolidated)

Honorable Kenneth Lee, Judge

AFFIRMED IN PART;
REMANDED IN PART

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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Daniel Lopez was convicted of numerous offenses arising out of a series of attacks on women in Tucson in 2004 and 2005. The trial court sentenced him to a combination of concurrent and consecutive prison terms totaling 119.5 years. On appeal, he argues that the court abused its discretion by denying his motions to sever the charges and try him separately for each victim, and that the evidence was insufficient to support three of the convictions.¹ Finding the evidence was insufficient to support one aggravated assault conviction, we reduce that conviction to simple assault and remand for resentencing on that conviction only. We otherwise affirm the convictions and sentences.

Severance and Consolidation

¶2 Lopez first argues the trial court abused its discretion in failing to sever the counts into separate cases according to victim and in allowing joinder on the basis of the counts being of the “same or similar character.” Ariz. R. Crim. P. 13.3(a)(1). The state initially filed two separate indictments against Lopez. The first, No. 20051252, pertained to the assaults of four victims—Heather, Jessica, Kiri, and Amelia—and the second, No. 20052157, pertained to the assaults of three additional victims—Michelle, Danielle, and Desiree. In the second indictment, the state alleged that the convictions anticipated on the offenses charged in the first indictment would constitute historical prior felony convictions

¹In a separate, contemporaneously filed, published opinion, we address an additional issue that meets the criteria for publication. *See* Ariz. R. Sup. Ct. 111(b), (h); Ariz. R. Crim. P. 31.26.

for sentence-enhancement purposes on the convictions anticipated on the offenses charged in the second indictment. Lopez filed separate motions to sever the counts under each indictment, pursuant to Rule 13.4(a) and (b), Ariz. R. Crim. P., seeking separate trials on offenses related to each victim. The court denied the motion to sever relating to the first indictment, No. 20051252.

¶3 Before the court ruled on the motion to sever relating to the second indictment, No. 20052157, Lopez moved to strike the state's allegations of historical prior felony convictions, or in the alternative, to consolidate all counts under both indictments. In this motion, Lopez stated that consolidation was proper because all counts under both indictments were ““of the same or similar character”” under Rule 13.3(a)(1) and that ““the ends of justice will not be defeated”” by consolidation under Rule 13.3(c). The court subsequently granted Lopez's motion to consolidate and thus implicitly denied his motion to strike the state's allegation of historical prior felony convictions. Lopez was tried for all charges in a single trial.

¶4 At trial, Lopez attempted to renew both motions to sever pursuant to Rule 13.4(c). The court denied the motion as to the charges under the first indictment and further stated that Lopez could not renew any motion as to the charges under the second indictment because he had subsequently moved to consolidate both indictments. Lopez objected and asserted he could still renew his motion to sever the counts under both indictments because

he had been compelled to move for consolidation by the trial court's prior rulings. The court noted the objection.

A. The Second Indictment

¶5 On appeal, Lopez argues the trial court erred by “failing to sever the cases” and “allowing joinder . . . on the basis of ‘same or similar character.’” When a party's conduct causes an alleged error at trial, we will not review that party's claim, even for fundamental error. *See State v. Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d 631, 632-33 (2001). “[W]e will not find reversible error when the party complaining of it invited the error.” *Id.*

¶6 Lopez essentially withdrew his motion to sever the charges in the second indictment before the court had ruled on it. In its stead, Lopez moved for consolidation, informing the court that joinder was appropriate. Yet, Lopez asserted to the trial court that he had not waived the issue of severance because he had effectively been forced to move for consolidation by the court's adverse rulings on the motion to sever regarding the first indictment and the motion to strike the allegations of historical prior felony convictions. But Lopez was not compelled to move for consolidation; he could have requested a ruling on his motion to sever regarding the second indictment and preserved the issue for appeal. He merely attempted one strategy and when that was unsuccessful, moved on to another. “Discretionary strategy evidenced by counsel's actions must, at some point, be binding on [the] defendant.” *State v. Levato*, 186 Ariz. 441, 444, 924 P.2d 445, 448 (1996). Lopez

was essentially trying to take two contrary positions and preserve both for appeal. But Lopez “cannot have it both ways.” *Id.* He invited any error regarding severance of the offenses in the second indictment when he failed to obtain a ruling on the motion and instead moved to consolidate, and we will not consider this issue as a ground for relief. *See Logan*, 200 Ariz. 564, ¶ 15, 30 P.3d at 633-34.

B. The First Indictment

¶7 As noted above, when Lopez renewed his motion to sever pursuant to Rule 13.4(c), the trial court acknowledged and denied his motion as to the charges under the first indictment. Because this motion was made and denied before Lopez moved to consolidate, and was renewed at trial, we conclude that Lopez preserved his claim regarding severance of the charges under the first indictment.

¶8 The trial judge denied the motion to sever regarding the first indictment in a detailed minute entry finding the attacks on the four victims were “of the same or similar character and the evidence of each incident [was] admissible under Rule 404(b)[, Ariz. R. Evid.,] to show identity in the trial of the other incidents.” Lopez contends the attacks were not of the same or similar character and the evidence would not have been admissible had he received separate trials for each incident.

¶9 We review a trial court’s decision to deny severance for an abuse of discretion. *State v. Prion*, 203 Ariz. 157, ¶ 28, 52 P.3d 189, 194 (2002). Similarly, we review a court’s decision to admit evidence pursuant to Rule 404(b) for an abuse of discretion. *State v. Van*

Adams, 194 Ariz. 408, ¶ 20, 984 P.2d 16, 23 (1999). Generally, when offenses are joined pursuant to Rule 13.3(a)(1), Ariz. R. Crim. P., for being of the “same or similar character,” the defendant is entitled to severance as a matter of right “unless evidence of the other . . . offenses would be admissible under applicable rules of evidence if the offenses were tried separately.” Ariz. R. Crim. P. 13.4(b); *see also State v. Ives*, 187 Ariz. 102, 106, 927 P.2d 762, 766 (1996). And, even if a court errs in deeming offenses to be of the “same or similar character,” when the evidence is cross-admissible as to each offense, it is unlikely the defendant can show prejudice. *See State v. Johnson*, 212 Ariz. 425, ¶¶ 10-11, 133 P.3d 735, 739-40, *cert. denied*, ___ U.S. ___, 127 S. Ct. 559 (2006).

¶10 Generally, evidence of other acts is not admissible to prove the defendant has the propensity or bad character necessary to commit a crime. *State v. Roscoe*, 145 Ariz. 212, 216, 700 P.2d 1312, 1316 (1984). But evidence of other acts may be admissible to show, *inter alia*, the identity of the perpetrator. *State v. Stuard*, 176 Ariz. 589, 597, 863 P.2d 881, 889 (1993). Under the identity exception, ““if the behavior of the accused both on the occasion charged and on some other occasion is sufficiently distinctive, then proof that the accused was involved on the other occasion tends to prove his involvement in the crime charged.”” *Id.*, *quoting* Morris K. Udall et al., *Arizona Law of Evidence* § 84, at 183-84 (3d ed. 1991). The *modus operandi* of the offenses must be ““so unusual and distinctive as to be like a signature.”” *Roscoe*, 145 Ariz. at 217, 700 P.2d at 1317, *quoting* McCormick on Evidence § 190, at 560 (3d ed. 1984). And there must be similarities between the

offenses where one might normally expect to find differences. *Id.* But our supreme court has also observed:

“Absolute identity in every detail cannot be expected. Where an overwhelming number of significant similarities exist, the evidence of the prior act may be admitted.” The term “overwhelming” does not require a mechanical count of the similarities but, rather, a qualitative evaluation. Are the two crimes so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature? If so, the evidence may be admissible and any dissimilarities go to its weight.

State v. Bible, 175 Ariz. 549, 576, 858 P.2d 1152, 1179 (1993), *quoting Roscoe*, 145 Ariz. at 218, 700 P.2d at 1318 (citation omitted). The identity exception is applied to sex offenses “where an adequate foundation is made showing that the prior offense was not too remote in time, was similar to the offense charged and was committed with a person similar to the prosecuting witness in the case being tried.” *Roscoe*, 145 Ariz. at 217, 700 P.2d at 1317.

¶11 Here, numerous similarities support application of the identity exception. The four attacks took place within a ten-month period. All four victims—Heather, Jessica, Kiri, and Amelia—were female students at the same university. The victims were all in their early to mid-twenties, apparently single, and they all lived with roommates. The assailant was a stranger to all four victims. The attacks all took place at the victims’ homes, which the parties stipulated are located in the university/midtown area. All four attacks took place between the hours of 1:00 and 4:00 a.m. All four victims gave similar descriptions of their assailant that corresponded with Lopez’s appearance at the time of his arrest. All four

victims noted that the assailant had a “quiet” or “soft” voice. The assailant in all four attacks threatened the victims and, in each attack, the assailant placed his hand over the victim’s mouth. Finally, the assailant in all four attacks took property that belonged to either the victims or their roommates.²

¶12 The trial court reasonably could have concluded the evidence concerning the four offenses contained enough similarities to support an inference that the same person had committed all four offenses. *See Roscoe*, 145 Ariz. at 217-18, 700 P.2d at 1317-18. Lopez argues that many of the similarities are not, in and of themselves, unusual in rape cases. But the court does not look at the uniqueness of each individual commonality; rather, as noted above, it engages in a “qualitative evaluation,” considering all the similarities together. *Bible*, 175 Ariz. at 576, 858 P.2d at 1179.

¶13 Lopez also points to several discrepancies that he argues show the attacks did not bear a signature. We acknowledge dissimilarities exist among the four offenses, but they are not significant enough to preclude the trial court from finding cross-admissibility under the Rule 404(b), Ariz. R. Evid., identity exception. *See Roscoe*, 145 Ariz. at 218, 700 P.2d at 1318 (evidence of prior offense involving seventeen-year-old assault victim in trial for offense involving seven-year-old murder victim admissible under identity exception); *Bible*, 175 Ariz. at 575-76, 858 P.2d at 1178-79 (evidence of prior offense in which defendant

²Lopez contends that “nothing was stolen from [Heather’s] residence.” But Heather testified specifically that two personal items had been taken by her attacker.

knew his seventeen-year-old victim admissible in trial for offense in which defendant did not know nine-year-old victim). Here, the dissimilarities between the four offenses go to the weight of the evidence, not its admissibility. *See Roscoe*, 145 Ariz. at 218, 700 P.2d at 1318.

¶14 After considering the closeness in time, the multiple shared characteristics of the victims, and the similarities in descriptions and actions of the assailant in all four attacks, we conclude the trial court did not abuse its discretion in ruling the evidence was cross-admissible to prove identity. Therefore, Lopez was not entitled to severance as a matter of right under Rule 13.4(b), Ariz. R. Crim. P. We do not address Lopez’s argument that the offenses were not of the “same or similar character” under Rule 13.3(a)(1), because in light of our finding that the evidence was cross-admissible, Lopez suffered no prejudice from joinder. *See Johnson*, 212 Ariz. 425, ¶ 11, 133 P.3d at 740.

¶15 Moreover, even assuming the trial court erred in finding the evidence cross-admissible, any such error was harmless. “[I]f the court can say, beyond a reasonable doubt, that the verdict would have been the same without the inadmissible evidence, the erroneously admitted evidence cannot be said to have contributed to the verdict.” *State v. Eggers*, 215 Ariz. 472, ¶ 49, 160 P.3d 1230, 1246 (App. 2007); *see also State v. Robles*, 182 Ariz. 268, 272, 895 P.2d 1031, 1035 (App. 1995) (no prejudice in denying severance of codefendant where evidence of defendant’s guilt overwhelming). And when the jury is instructed to consider offenses separately and to determine whether each offense has been

independently proven beyond a reasonable doubt, the defendant is not prejudiced. *Johnson*, 212 Ariz. 425, ¶ 13, 133 P.3d at 740.

¶16 The state argues the evidence as to each of the four attacks under the first indictment overwhelmingly proved Lopez’s guilt for each offense and therefore he has suffered no prejudice. Lopez concedes that DNA evidence linked him to the attacks on Heather, Jessica, and Kiri. As to Amelia, although no biological evidence linked Lopez to the attack, the assailant had stolen four “Nixon” watches from Amelia’s roommate. The police later found two of these watches inside Lopez’s residence. Substantial testimony established that these watches were unique, suggesting it was unlikely that Lopez coincidentally had owned the same watches that had been stolen from Amelia’s roommate. Amelia’s roommate also testified that the watches found in Lopez’s residence “looked exactly” like the ones that had been stolen. In addition, as noted above, Amelia’s description of her assailant corresponded with the description of Lopez at the time of his arrest. Finally, Amelia described in detail the jacket her assailant had been wearing. The police found a jacket matching this description inside Lopez’s residence. Amelia identified the jacket at trial, testifying it was identical to the one her attacker had worn.

¶17 We find that had Lopez been tried separately for the attacks on each of the four victims alleged in the first indictment, the jury would have found him guilty beyond a reasonable doubt at each trial. Moreover, the jury was instructed to consider the evidence

for each offense separately when determining guilt. Any error by the trial court in finding the evidence to be cross-admissible was harmless.

Sufficiency of the Evidence

¶18 Lopez argues the trial court erred by denying his motion for judgment of acquittal on three counts pursuant to Rule 20, Ariz. R. Crim. P., asserting the evidence was insufficient to support his convictions. When considering challenges to the sufficiency of the evidence, “we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction.” *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). “Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn therefrom, the case must be submitted to the jury.” *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citation omitted). We do not reassess the evidence to determine whether we would convict the defendant; rather, we assess whether there was enough evidence for a rational jury to have found the defendant guilty beyond a reasonable doubt. *See State v. Garfield*, 208 Ariz. 275, ¶ 6, 92 P.3d 905, 907 (App. 2004).

A. Armed Robbery

¶19 Lopez first claims no substantial evidence supports his conviction of armed robbery of Jessica. Lopez approached Jessica outside her front door, grabbed her and threw her to the ground. He then put a box cutter blade to her face and told her that if she was quiet and cooperated, nothing bad would happen. Lopez then dragged Jessica under a tree

and sexually assaulted her. During the assault, Jessica's cell phone began to ring. Lopez went to retrieve the phone and Jessica's other belongings, which were lying by the door of the house. Jessica asked if she could have her cell phone. Lopez said "no" and left, taking Jessica's cell phone, purse, camera, and wallet. Lopez was convicted of armed robbery as well as other charges related to the attack.

¶20 Section 13-1902(A), A.R.S., defines the offense of robbery as follows:

A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

Section 13-1094(A) provides that the offense becomes armed robbery "if, in the course of committing robbery . . . such person . . . [i]s armed with a deadly weapon or . . . [u]ses or threatens to use a deadly weapon or dangerous instrument."

¶21 Lopez argues there was insufficient evidence to convict him of armed robbery, contending "[t]he facts adduced at trial do *not* indicate that [Lopez] used force as a means of gaining control of [Jessica's] property." But in *State v. Garcia*, 138 Ariz. 211, 213, 673 P.2d 955, 957 (App. 1983), under similar circumstances this court found the evidence sufficient to support a robbery conviction. There, two defendants had attacked one victim and while one of the defendants sexually assaulted the victim, the other went through the victim's belongings. *Id.* at 214, 673 P.2d at 958. After the attack, the victim was missing some money. *Id.* We found there was sufficient evidence that the defendants had

threatened or used force against the victim with the intent to coerce surrender of her property or prevent resistance. *Id.* at 215, 673 P.2d at 959. We stated, “[t]he record [was] replete with evidence of appellants’ threats and use of force to accomplish the sexual assault. This does not mean they could not have been used to accomplish the robbery as well. Appellants’ intent was . . . a question for the jury.” *Id.* Although the present case involves a somewhat different factual pattern, we believe the same conclusion is warranted. When Lopez took control of Jessica’s cell phone and other property, he had already threatened her with a weapon, physically overpowered her, and sexually assaulted her. The evidence was sufficient for the jury to conclude that Lopez had used these actions with the intent of accomplishing both the assault and the taking of property.

¶22 The fact that Lopez took the property *after* he had used force to subdue and assault Jessica does not undermine the jury’s finding of intent. In *State v. Denman*, 186 Ariz. 390, 391, 393, 923 P.2d 856, 857, 859 (App. 1996), this court found the evidence was sufficient to show a defendant’s use of force was intended to coerce surrender of the victim’s truck even though the force was applied before any attempt to take the truck. We found that “the force used had a residual effect which aided the Defendant and his confederate to take the truck.” *Id.* at 393, 923 P.2d at 859. Here, the jury rationally could infer that Lopez’s use of force in threatening and sexually assaulting Jessica had a similar “residual effect” in taking her belongings and “served to prevent [her] from resisting.” *Id.*

¶23 Lopez cites *State v. Lopez*, 158 Ariz. 258, 762 P.2d 545 (1988), and *State v. Wallace*, 151 Ariz. 362, 728 P.2d 232 (1986), in support of his claim that the evidence was insufficient. The defendants in both cases murdered their victims and then stole property that had belonged to them. *Lopez*, 158 Ariz. at 264, 762 P.2d at 551; *Wallace*, 151 Ariz. at 364, 728 P.2d at 234. Our supreme court held in both cases that the evidence did not show that the intent to commit a robbery was coexistent with the use of force. *Lopez*, 158 Ariz. at 264, 762 P.2d at 551; *Wallace*, 151 Ariz. at 366, 728 P.2d at 236. Rather, the evidence showed that the motive for the murders was something other than robbery and the intent to take property arose only after the victims were dead. In *Lopez*, the motive for taking the murder victim's car and wallet was to escape, delay identification of the victim and destroy evidence. 158 Ariz. at 264, 762 P.2d at 551. In *Wallace*, the defendant's motive for stealing money was to get "drunk" after having killed his girlfriend and her children. 151 Ariz. at 365-66, 728 P.2d at 235-36.

¶24 Here, no evidence explains why Lopez took Jessica's cell phone, purse, wallet, and camera or definitively shows that Lopez did not have the motive to steal at the time he used force. Lopez argues the ringing of the cell phone drew his attention to Jessica's belongings and implies that this shows his motive to steal arose only after he had used force. But there was also evidence that he had taken property from five other victims and/or their roommates. Lopez did not steal from Danielle but during that attack, she fought Lopez off,

eventually pushing him out of her bedroom window before he could sexually assault her or take any property.

¶25 Based on evidence that Lopez had taken property from five other victims, and/or their roommates, the jury reasonably could have found that he had intended to take property from Jessica when he initiated the attack. *See State v. Van Adams*, 194 Ariz. 408, ¶ 20, 984 P.2d 16, 23 (1999) (under Rule 404(b), Ariz. R. Evid., evidence of other acts may be used to prove defendant's intent). We acknowledge the argument that Lopez's intent arose only after he heard the phone ring is plausible. But when reasonable minds could differ on whether a defendant had the requisite intent at the time he used force, we must uphold the jury's inherent conclusion that the evidence was sufficient. *See Landrigan*, 176 Ariz. at 4, 859 P.2d at 114.

B. Aggravated Assault

¶26 Lopez next claims no substantial evidence supports his conviction of aggravated assault in the attack on Danielle. Lopez used some sort of electric stun gun in his attempt to subdue Danielle. She testified at trial that she had scars on her chest, her left arm, and her back. Apparently, one of the injuries had been bleeding after the attack. She also testified her shoulder had been bruised during the struggle with Lopez. The state admitted photographs of Danielle's various injuries, which had been taken by a crime scene specialist on the same night as the attack. Lopez was convicted of aggravated assault on the grounds that he had caused temporary but substantial disfigurement of Danielle. Lopez

contends there was insufficient evidence to show that Danielle’s injuries rose to the level of substantial disfigurement.

¶27 Section 13-1203(A), A.R.S., defines assault as follows:

1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
3. Knowingly touching another person with the intent to injure, insult or provoke such person.

At the time Lopez committed the offense, A.R.S. § 13-1204(11) stated, in relevant part, that a person commits aggravated assault “[i]f the person commits assault by any means of force which causes temporary but substantial disfigurement.” 2001 Ariz. Sess. Laws., ch. 124, § 3.³ Other injuries that elevate a simple assault to aggravated assault include “temporary but substantial loss or impairment of any body organ or part, or a fracture of any body part,” *id.*, and “serious physical injury,” § 13-1204(A)(1). Serious physical injury includes a “physical injury which creates a reasonable risk of death, or which causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.” A.R.S. § 13-105(34).

³The legislature has since amended the statute, making minor, non-substantive changes to this language, and moving it to subsection (A)(3) of the statute. *See* 2007 Ariz. Sess. Laws, ch. 47, § 1.

¶28 The legislature included the circumstance of “temporary but substantial disfigurement” with other injuries in elevating simple assault to aggravated assault. It must have intended that the injuries be of a similar quality in order to invoke similar penalties. *See* A.R.S. § 13-101(4) (one purpose of Title 13 is to “differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties for each”). In *State v. George*, 206 Ariz. 436, ¶¶ 8-9, 79 P.3d 1050, 1055 (App. 2003), this court concluded that the fact that there are different penalties for aggravated assault causing “temporary but substantial disfigurement” and aggravated assault causing serious physical injury reflects that “the legislature intended ‘serious physical injury’ to refer to an injury more serious than those injuries justifying” a lower felony classification. Further, we determined that “the legislature intended ‘serious impairment of health’ to be comparable in terms of its gravity to an injury that creates a reasonable risk of death or substantial and permanent disfigurement.” *Id.* ¶ 10, *quoting* § 13-105(34). Using the same analytical approach, we conclude that the legislature must have intended “temporary but substantial disfigurement” to describe an injury comparable in gravity to “temporary but substantial loss or impairment of any body organ or part, or a fracture of any body part.” 2001 Ariz. Sess. Laws, ch. 124, § 3.

¶29 “Disfigurement” is defined in *Black’s Law Dictionary* 501 (8th ed. 2004) as “[a]n impairment or injury to the appearance of a person or thing.” *See also Moreno v. Indus. Comm’n*, 122 Ariz. 298, 299, 594 P.2d 552, 553 (App. 1979) (“To disfigure is to mar

the appearance of an object.”); *State v. Garcia*, 138 Ariz. 211, 214, 673 P.2d 955, 958 (App. 1983) (breaking victim’s hymenal membrane not disfigurement because it “does not impair the visible appearance of the victim”); *State v. Ortega*, 422 P.2d 353, 355 (N.M. 1966) (“[T]he word ‘disfigurement’ has no technical meaning and should be considered in the ordinary sense.”).

¶30 The photographs that were admitted into evidence show Danielle’s skin was marred to some extent. We conclude the injuries meet the basic definition of disfigurement. Therefore, the dispositive question is whether the temporary disfigurement was substantial.⁴ The relevant definition of “substantial” in the *American Heritage Dictionary* 1213 (2d college ed. 1982) is “[c]onsiderable in . . . degree, amount, or extent.” The photographs of Danielle’s injuries depict some bruising on her arm, some thin red marks on her skin, as well as one mark on her lower back that appears to have previously bled. At trial, Danielle testified that she still had some scars, though she was unsure whether there was a scar on her back, which was the location of what appears to have been the worst injury. She said she probably had a “little scar” there. The state did not produce any testimony, medical or otherwise, concerning the severity of the injuries. We find the injuries cannot fairly be described as considerable in degree, amount, or extent. On the basis of this evidence,

⁴The state contends Danielle testified that her scars were permanent and it uses this assertion to bolster the argument that her injuries were substantial. But in fact, Danielle never stated that her scars were permanent.

Danielle's injuries, taken individually or collectively, are temporary disfigurements, but do not rise to the level of "substantial disfigurement."

¶31 Nevertheless, the state claims that *State v. Pena*, 209 Ariz. 503, ¶¶ 3-4, 9, 104 P.3d 873, 874-75 (App. 2005), stands for the proposition that the mere existence of a scar was enough to constitute a serious and permanent disfigurement. Such a broad interpretation of *Pena* is incorrect. In that case, we only held that the evidence of the severity of that particular injury was sufficient to support a finding of a serious and permanent disfigurement. *Id.* ¶¶ 4-5, 9, 104 P.3d at 875-76. Any scars here are very different.

¶32 Based on the reasoning above, we find the evidence was insufficient for the jury to find Lopez guilty beyond a reasonable doubt of aggravated assault. However, the court instructed the jury on all the elements of assault as part of the aggravated assault instruction. The evidence was sufficient for the jury to find Lopez guilty beyond a reasonable doubt of assault, and Lopez does not argue otherwise. Pursuant to A.R.S. § 13-4036, this court has the power to modify a judgment "which is consistent with the justice and rights of the state and the defendant." *See also State v. Dixon*, 107 Ariz. 415, 421, 489 P.2d 225, 231 (1971) (when evidence insufficient to show voluntary manslaughter but sufficient to show involuntary manslaughter beyond a reasonable doubt, supreme court may revise judgment "to conform to the evidence"); *State v. DiGiulio*, 172 Ariz. 156, 161, 835 P.2d 488, 493 (App. 1992) (citing § 13-4036 in modifying judgment of conviction on first-

degree criminal trafficking to lesser-included offense of second-degree criminal trafficking); *cf. Acuna v. Kroack*, 212 Ariz. 104, n.15, 128 P.3d 221, 232 n.15 (App. 2006) (statute granting supreme court certain powers “presumably applies as well to the court of appeals inasmuch as the statute was enacted long before the creation of this court”). Therefore, we modify Lopez’s conviction for aggravated assault of Danielle to assault and remand for resentencing. *See Garcia*, 138 Ariz. at 217, 673 P.2d at 961.

C. Sexual Assault

¶33 Lopez next contends the state did not produce any substantial evidence of anal penetration to support one of the sexual assault convictions in the attack on Desiree. Lopez was charged with having committed sexual assault by penetrating Desiree’s anus with his penis. Thus, to convict Lopez of this charge, the state had to prove that he intentionally or knowingly had penetrated Desiree’s anus with his penis without her consent. *See A.R.S.* §§ 13-1401(3); 13-1406(A). The parties agree that the slightest penetration completes the offense. *See State v. Kidwell*, 27 Ariz. App. 466, 467, 556 P.2d 20, 21 (1976).

¶34 Desiree testified that Lopez “tried to go in with his penis anally,” that she “felt the pulling,” and that it hurt. The pain caused her to yell. Additionally, she told Toni Y.,

the nurse who examined her, that Lopez’s penis penetrated her anus.⁵ From this evidence, the jury could have concluded that there had been at least slight penetration.

¶35 Lopez contends that, because Desiree testified that Lopez “tried to go in with his penis anally,” and made a similar statement to the detective who interviewed her after the assault, the record contains insufficient evidence of actual penetration. But Desiree’s statement that Lopez “tried to go in with his penis anally” is not equivalent to testimony that not even the slightest penetration had occurred. Moreover, as we previously stated, Desiree told Toni that Lopez had penetrated her anally, and Toni read Desiree’s statements at trial.

¶36 Lopez contends that Toni’s testimony was ambiguous and nonresponsive. Toni testified that she had asked Desiree if the penis had penetrated and then related Desiree’s answer: “Well, yes, it did. Vulva and anus.” This was in response to the prosecutor’s inquiry about what questions Toni had asked Desiree. Toni’s testimony was neither ambiguous nor nonresponsive.

¶37 Lopez also emphasizes Toni’s testimony that there was injury only to the exterior of Desiree’s anus. But the state did not have to demonstrate injury. *See* §§ 13-1401(3); 13-1406(A). And the state is not required to produce medical evidence of penetration. *See State v. Cañez*, 202 Ariz. 133, ¶ 42, 42 P.3d 564, 580 (2002) (“Physical

⁵In pointing to the evidence the state argues supports the jury’s verdict, the state contends that Toni testified that “the types of injuries she observed to Desiree’s anus were consistent with forced anal intercourse.” But Toni’s opinion about whether the injuries were consistent with anal penetration was stricken and the jury was instructed not to consider it. We therefore cannot consider it in evaluating the sufficiency of the evidence.

evidence is not required to sustain a conviction where the totality of the circumstances demonstrates guilt beyond a reasonable doubt.”); *State v. Williams*, 111 Ariz. 175, 177-78, 526 P.2d 714, 716-17 (1974) (victim’s uncorroborated testimony sufficient to sustain rape conviction unless “physically impossible or so incredible that no reasonable person could believe it”). From Desiree’s and Toni’s testimony, a jury could have concluded that there was some anal penetration, however slight. Accordingly, sufficient evidence supports the conviction of sexual assault based on anal penetration.

Conclusion

¶38 For the foregoing reasons, we modify the aggravated assault conviction involving Danielle to simple assault and remand for resentencing on that count only. We otherwise affirm Lopez’s convictions and sentences.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge

